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MAR 10 1952

In the Supreme Court of the United States

OCTOBER TERM, 1951

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

HERBERT HAYE, ALFRED FISCHL, AND MURRAY HAYE, D/B/A WILLIAMSBURG STEEL PRODUCTS COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 222

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

BENNE KATZ, ALFRED FINKEL, AND MURRAY KATZ, D/B/A WILLIAMSBURG STEEL PRODUCTS COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

I. RESPONDENT'S UNILATERAL ACTION TOOK PLACE PRIOR TO IMPASSE

In its brief, respondent contends (Br. 4, 31–39) that it was justified in taking unilateral action because the Union had caused an impasse and a breakdown in negotiations. However, the Board found that no impasse had occurred at the time of respondent's actions (I. 14, 30), and this finding is supported by substantial evidence on the record as a whole.

Thus, the first bargaining session was held on August 30, 1956, and there were 10 meetings thereafter, up through May 13, 1957 (I. 21). Finkel, the Com-

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pany partner responsible for labor relations, testified that the subject of merit increases was mentioned at the meetings on August 30, October 2 and October 10, with the understanding that negotiations on the subject would be conducted at a later date (I. 26; 231, 236, 240, 245, 264, 248, 254). And the subject was discussed at least as late as April 4, 1957 (I. 78–79). Nevertheless, on October 1, 1956, and again on January 1, 1957, the Company, without notice to or negotiations with the Union, granted a total of 54 merit increases to the 50 employees in the bargaining unit (I. 26; 101).

Similarly, sick leave policy had been the subject of discussion between the parties at three conferences prior to March 11, 1957, and neither side had arrived at a definitive position (I. 27; 57, 62–63, 66, 241–242, 250, 255). However, about March 11, 1957, the Company, without notifying or consulting the Union, made a substantial change in sick leave policy, retroactive to January 1, 1957 (I. 27; 275–276, 268–269). When the Union protested, the Company asserted that it did "not feel obligated to explain the matter * * * since we are not as yet bound to you until an agreement has been reached between us" (I. 27; 270).

Finally, the subject of wage rates was still open for discussion when the Company took unilateral action with respect to them shortly before April 11, 1957. The Company, negotiating along with other employers in the Association, first took the position that a general wage increase could not be considered until the Union had indicated what fringe items it desired;

then it proposed a series of minimum and maximum wage rates for each job classification; finally it offered to discuss a general wage increase on an Association basis (I. 68–72). Thereafter, on December 5, 1956, a mediator for the State of New York entered the negotiations and suggested a "cooling-off" period pending the outcome of meetings with Aetna, another employer in the same industry (I. 74–75). The mediator called the parties together again on March 29, 1957, when the Union proposed the contract which had just been concluded with Aetna (I. 280, II. 368). At the next meeting, on April 4, the Company proposed, instead, a three-year contract with a wage increase of $7.50 per week the first year and $5.00 per week in the succeeding years (I. 81). Before the Union could evaluate this proposal and the parties could meet again, the Company, on April 11, without notifying the Union, placed into effect a change in wage rates which was even more favorable than that previously offered the Union (I. 27; 85, 177, 179). Moreover, after this action was taken, wages still continued to be a subject for negotiation. Thus, at a meeting on May 1, 1957, the employers decided that they would submit their first written counterproposal "containing their position, including money" (I. 87). This counterproposal was received on May 8 (I. 86–88, II. 403) and negotiations did not finally break off until May 13, 1957 (I. 14; 89–91).

In sum, it is clear that an impasse in the bargaining had not been reached at the time the Company took its unilateral action with respect to merit increases, sick leave policy and wage rates.

II. THE UNION'S REQUEST FOR A "MOST FAVORED NATION CLAUSE" DID NOT JUSTIFY RESPONDENT'S UNILATERAL ACTION

Respondent further contends (Br. 39–42) that it was justified in taking unilateral action because the Union had bargained in bad faith and presented an impassable barrier to further negotiations by insisting on a contract containing a "most favored nation clause" similar to one previously agreed to by Aetna.[1] This contention was specifically considered and rejected by the examiner and the Board (I. 14, 29–30).[2] It finds no support in the evidence in the record. Contrary to respondent's assertion (Br. 40),[3] the Board found, and the record shows, that the Aetna contract was not brought into the negotiations until

[1] The clause to which Aetna had agreed provided (I. 29, 280) that no other employer in the industry

"* * * shall be accorded terms and conditions in a collective bargaining agreement which are more favorable than those contained herein; including classifications and minimum rates of pay. The foregoing however, shall not apply to general wage increases and rates of pay."

[2] Both the Board and the examiner actually made findings directly contrary to respondent's contentions. Thus, the examiner's Intermediate Report stated (I. 30):

"Rather than demonstrating bad faith bargaining by the Union, the entire record compels the conclusion that it was Respondent's conduct which brought the negotiations to naught."

[3] The record (I. 74, 75, II. 28) cited by respondent for the claim that the Aetna contract was "first considered and discussed on December 5, 1956," establishes only that the parties were informed at that meeting that separate negotiations were under way with Aetna. As there was no Aetna contract in being, its terms were not—and could not have been—discussed.

March 29, 1957, by which point the Company had already taken unilateral action on merit increases and sick leave policy (I. 14, 29–30; II. 368, I. 280). Moreover, the Union agent, Raimist, testified that he had advised the employers at the March 29 meeting and subsequently that the "favored nations" clause in the Aetna contract did not preclude the negotiation of different terms with them (II. 31–32). Indeed, the parties continued to discuss other terms for about six weeks after the Aetna clause was first introduced in the negotiations (I. 30). In these circumstances, it is apparent that the Aetna clause presented no barrier to negotiations and did not justify respondent's unilateral action. See *National Labor Relations Board* v. *Superior Fireproof Door & Sash Co.*, 289 F. 2d 713, 718 (C.A. 2).

III. A BARGAINING ORDER IS NOT RENDERED INAPPROPRIATE BY REASON OF THE LAPSE OF TIME SINCE CERTIFICATION

Finally, there is no merit to respondent's contention (Br. 42–45) that, even if the Court were to agree that respondent's unilateral action violated Section 8(a) (5) and (1) of the Act, it is improper, in view of the over five years which have elapsed since the Union was certified, to order the employer to bargain with it. Respondent argues that a bargaining order should now be conditioned upon the Union demonstrating, in a Board election, that it still enjoys the support of a majority of the employees. It has long been settled, however, that, where an employer has unlawfully refused to

bargain with a union, the appropriateness of an unconditional bargaining order is not diminished by the lapse of time during which the unfair labor practices were being litigated or by the fact that the union may have, in the meantime, lost its majority support. The reason for this conclusion is that otherwise the employer would in effect be able to profit from his wrongdoing, since the loss in majority may fairly be attributed to the unfair labor practices. See *Franks Brothers Co.* v. *National Labor Relations Board*, 321 U.S. 702; *National Labor Relations Board* v. *P. Lorillard Co.*, 314 U.S. 512; *National Labor Relations Board* v. *Mexia Textile Mills*, 339 U.S. 563, 567–568; *Superior Engraving Co.* v. *National Labor Relations Board*, 183 F. 2d 783, 793 (C.A. 7), certiorari denied, 340 U.S. 930; *National Labor Relations Board* v. *Swift & Co.*, 162 F. 2d 575, 583–585 (C.A. 3), certiorari denied, 332 U.S. 791; *Semi-Steel Casting Co.* v. *National Labor Relations Board*, 160 F. 2d 388, 392–393 (C.A. 8), certiorari denied, 332 U.S. 758. Nor is a different conclusion required by *National Labor Relations Board* v. *Adhesive Products Corp.*, 281 F. 2d 89 (C.A. 2), and *National Labor Relations Board* v. *Superior Fireproof Door & Sash Co.*, 289 F. 2d 713 (C.A. 2). Those cases are distinguishable on their special facts, as the Second Circuit itself has recently noted in *National Labor Relations Board* v. *Philamon Laboratories, Inc.*, 49 LRRM 2624. (January 17, 1962), in upholding an unconditional bargaining order.[4]

[4] Thus, the court pointed out that in "*Adhesive Products* we directed an election because the employees' initial choice was made in an atmosphere which did not allow 'opportunity of

CONCLUSION

For these reasons, as well as those set forth in our opening brief, the judgment of the court below should be reversed and the case remanded with directions to enter a decree enforcing the Board's order.

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MARCH 1962.

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giving the matter due and proper reflection and consideration,'" and in "*Superior*, an election was directed because of an 'inordinate delay' in the Board's proceedings and because the union had abandoned the employees for six months after certification and had not represented them for nearly four years." *Philamon Laboratories*, *supra*, 49 LRRM at 2628. Assuming *arguendo* that the factors relied on in *Adhesive Products* and *Superior* are valid reasons for creating an exception to the *Franks Bros.* rule, *supra*, these factors are not present here. There is no question that the employees' initial selection of the Union, in a Board-conducted election, was a free one; moreover, the Union did not abandon the employees but, on the contrary, vigorously sought to secure a contract.

U.S. GOVERNMENT PRINTING OFFICE: 1962